Gas Station Fall No Jackpot For Casino Visitor

ExxonMobil convinced jury that state controlled parking area

By **THOMAS B. SCHEFFEY**

Janet Dilisio v. ExxonMobil Corp.: On an excursion from her home in Nashua, N.H., to the Mohegan Sun casino in 2007, Janet Dilisio stopped at the Plainfield ExxonMobil service station on southbound I-395.

She bought a candy bar, and on the way back to her car, parked on the periphery of the lot, tripped on a 23-inch by eight-inch hole in the pavement that was about five inches deep. She claimed she damaged the tendons in her ankles so badly she couldn't do her job as a nurse's aide for five months.

Attorney **Kara M. Burgarella** of New London's **Faulkner & Boyce** represented Dilisio in the subsequent negligence case against ExxonMobil. **Robert R. Simpson** of Hartford-based **Shipman & Goodwin** defended ExxonMobil, and this month won a defense verdict in the case.

Initially, Dilisio also sued the owner of the property, Connecticut's Department of Transportation, which leases the site to ExxonMobil. Under Connecticut's Highway Defect Statute, a plaintiff injured by flaws in a state-owned highway or sidewalk must prove the defect was the "sole proximate cause" of the injury in order to recover anything. Thus, it was highly unlikely Dilisio could have recovered from both defendants at trial. For strategic reasons, a week before the trial in Willimantic, the plaintiff withdrew her claims against the state and proceeded against ExxonMobil alone.

Burgarella said she was aware she didn't have a strong case. Over three days of trial, she introduced 13 documentary exhibits in a traditional, low-tech presentation. In contrast, Burgarella characterized Simpson's presentation as "techno theater." He made his points with a large projection screen for video deposition testimony, laser pointers, and computer graphics. In all, Simpson presented 80 defense exhibits, using video excerpts to impeach Dilisio and others. He said he's learned from jurors that impeaching testimony with video clips has a great deal more impact than using typed transcriptions.

The plaintiff's lawyers didn't stint on resources, either, Simpson noted. They hired an investigator and engineer Gilbert Nichols to establish that the pavement was defective.
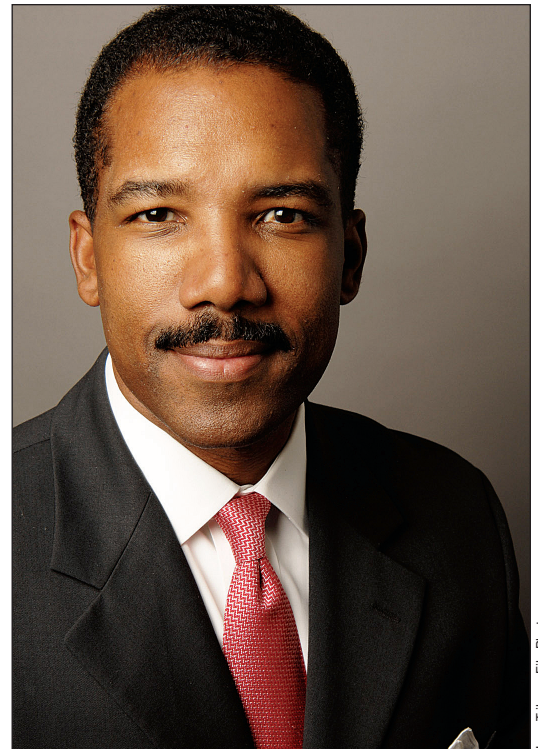
Simpson said he had no theory of how Dilisio actually fell.

"I'll leave that up to her to explain," he told the jury, predicting that when she did, it "would not make any sense."

In his cross-examination of Dilisio, Simpson brought out testimony that from the moment she fell, she was planning to sue. Dilisio's husband took photographs of the scene. Viewing one of them, Dilisio told Simpson that she was trying to avoid stepping on a patch of leaves more than three feet away from the hole in the pavement.

"I then asked her one of those golden open-ended questions that you're not supposed to do in cross-examination," said Simpson. "'How did you fall in that hole, given [how far away] the leaves are located?' She paused for about 20 seconds – a long pause in cross-examination – and said, 'Well, I must have stepped over the leaves in order to get into the hole.' That was the first time she told that story."

Simpson had presented other versions of how Dilisio fell, but said that this was a

Law Tribune File Photo

Defense attorney Robert R. Simpson said the plaintiff didn't seek medical treatment for two days after her fall, and in fact spent the time gambling at Mohegan Sun.

new explanation. During his closing arguments, Simpson said he focused on credibility and common sense: "There were too many stories."

He also attempted to dispute the seriousness of the plaintiff's injuries by tracing what she did after the incident. Dilisio testified that when she fell, she was in excruciating pain and immediately knew she would have to bring a lawsuit and wouldn't be able to work for months, said Simpson. "So what did she do next?" he asked the jury. "She didn't go to the doctor or the hospital

or even the health-care facility at the casino," Simpson recounted in closing. Instead, for the two days after her fall, she played slot machines and blackjack. "She said later on she thought she was going to get better," Simpson noted.

Burgarella explained that her client has only a ninth-grade education, and was not deceptive in her answers, but was confused by Simpson's aggressive cross-examination.

Early in the case, ExxonMobil offered a $25,000 settlement Simpson described as a "gift." Dilisio countered with a $50,000 offer of compromise, which ExxonMobil didn't take. In her closing, Burgarella asked for $74,000 in economic and non-economic damages up to the time of trial, and unspecified additional damages for future pain, fear and complications.

Near the end of trial, the plaintiff offered, through Superior Court Judge **Michael E. Riley,** to settle for $37,500. ExxonMobil had previously told the judge it wasn't interested in even hearing about any figure substantially higher than its original $25,000 offer, so Riley didn't mention the last-minute settlement overture, Simpson said.

In his closing arguments, Simpson used a chart on the projection screen that took the jury to law school. It broke out the elements of tort responsibility for owners and occupiers of land. "Just because ExxonMobil was there, doesn't mean it was in control of the property," Simpson said. In this case Simpson had shown the state was responsible for landscaping, snow removal and other upkeep under the lease.

At the end of the day June 2, the six jurors took only 40 minutes to answer the first question of its questionnaire, which asked whether ExxonMobil had control of the property. Once they found the answer was "no," they didn't have to consider the issue of ExxonMobil's alleged negligence.

Burgarella said she was surprised that the jury concluded the gas station occupants did not control their own premises. "I thought that the big issue would be comparative negligence," said Burgarella, "But they got me on control." ∎